

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANET E. HOOVER)	
Claimant)	
VS.)	
)	Docket No. 1,041,615
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Fund)	

ORDER

Respondent and its insurance fund requested review of the July 21, 2009, Award entered by Administrative Law Judge Steven J. Howard. The Board placed this appeal on its summary docket for disposition without oral arguments.

APPEARANCES

William W. Hutton of Kansas City, Kansas, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant fell at work on October 9, 2006, and injured her right knee. In the July 21, 2009, Award, Judge Howard awarded claimant permanent disability benefits for a 36 percent impairment to the right lower extremity.

Respondent appealed the July 21, 2009, Award, but respondent failed to designate the issues it was raising in its Notice of Appeal. Moreover, respondent failed to file its brief with the Board within its allotted time. Consequently, claimant requested the Board to dismiss this appeal due to respondent's alleged defective notice of appeal and respondent's

failure to file its brief in a timely manner. Respondent acknowledged it failed to file its brief within its allotted time. Respondent, however, requested the Board to review the submission letter that respondent filed with the Judge.

Based upon the regular hearing transcript, the parties' submission letters to the Judge, and the parties' filings with the Board, the following issues are now before the Board:

1. Should the appeal be dismissed because respondent failed to designate the issues it was raising in its notice of appeal and/or because respondent failed to file its brief with the Board within its allotted time?

Claimant contends respondent failed to comply with K.A.R. 51-18-4 and, therefore, this appeal should be dismissed for lack of jurisdiction. Respondent maintains the regulation cited by claimant does not provide for dismissing an appeal should a party fail to file its brief with the Board in a timely fashion. Also, respondent argues there is nothing in the Workers Compensation Act that provides for dismissing an appeal for a defective notice of appeal.

2. Should respondent's October 13, 2006, Employer's Report of Accident be admitted into evidence?

At the regular hearing claimant objected to that exhibit because it was prepared during a telephone conversation and she did not have an opportunity to review it when it was prepared. The record is not clear whether the Judge admitted the document into the record.¹ The Judge did not refer to the document in the Award when analyzing the evidence.

3. Did claimant's accident arise out of her employment?

Respondent contends claimant's accident is not compensable as it occurred due to a personal condition; namely, her right knee allegedly gave way due to her weight and the arthritis in that joint. Claimant contends her accident arose out of her employment either because she slipped in water or her fall is unexplained. The Judge found the accident occurred when claimant slipped on a wet floor.

4. What is the extent of claimant's impairment?

The Judge found claimant sustained a 36 percent impairment to the right lower extremity, which was based upon the opinion of Dr. Terrence Pratt. Respondent argues

¹ R.H. Trans. at 27.

Dr. Pratt's medical report and opinion should be interpreted as indicating claimant sustained a 23 percent impairment to the right lower extremity. Claimant requests the Board to affirm the Judge's finding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

Claimant worked for respondent at the Osawatomie State Hospital as a senior cook. On October 9, 2006, claimant fell and injured her right knee as she was returning to her work area following a break. The question surrounding claimant's accident is why it occurred.

Claimant testified she was walking and talking with co-workers and suddenly found herself face down on the kitchen floor.² She testified her right knee struck the tile floor and her left knee landed on rubber mats that had been folded. Claimant has a history of bilateral knee problems. In 2004 claimant underwent left knee arthroscopic surgery and in 2005 she had right knee arthroscopic surgery. And although claimant acknowledges there were occasions when her left knee seemingly popped and gave way, she denies that her right knee ever gave way.³

Within minutes of the accident, claimant prepared an injury report. There is no objection to that October 9, 2006, injury report in which claimant reported:

Walked into Kitchen went to turn off water drip to power soaker when right knee gave way & I fell & hitting back on right side of pot & pan machine. Right knee began swelling immediately.⁴

Claimant testified, however, that she does not believe her right knee "just gave out"⁵ and she now contends she does not know why she fell.⁶ In addition, claimant testified that respondent keeps rubber mats around the power washer where she fell because of water on the floor and her right side was wet after she fell. But those rubber mats had been folded as the employees were planning to mop the floor after their break.

² *Id.*, at 9.

³ *Id.*, at 12.

⁴ *Id.*, Cl. Ex. 1.

⁵ *Id.*, at 14.

⁶ *Id.*, at 20, 21.

On cross-examination claimant testified she initially believed that one of her knees had possibly given way but she did not know why she fell.

Q. (Mr. Benedict) I believe a minute ago you testified that you thought you had slipped in water that day; is that correct? Is that what you said?

A. (Claimant) I found myself on the floor. I don't know exactly what happened. I just found myself on the floor.

Q. Actually, I think I just misquoted myself. I think you said, didn't you say you thought your right knee gave [way]?

A. I thought one of my knees had possibly given [way].

Q. Now, if you look at where, in [section] B where it talks about specific injured site does it say, "when right knee gave way"?

A. I see that.

Q. Does it say that you thought your right knee gave way?

A. I did put that, but I thought maybe one of my knees had given [way].

Q. Does it say that you thought your right knee gave way or does it say, "right knee gave way"?

A. It says "when."⁷

The October 9, 2006, injury report also contains a notation of "Not due to water," which claimant denies writing on the form. Claimant likewise denies writing the name of Brenda Spencer on the form, who allegedly witnessed the accident. There is no testimony to contradict that assertion. On that injury report claimant also circled "Slip or fall inside" in the section that asked for the cause of the injury. Finally, there is also a checkmark on the form that indicates a work order was submitted to Facility Services.

The accident occurred at about 5 p.m. Approximately two hours later claimant was seen in the emergency room of the Miami County Medical Center. The nurse's assessment form indicates that claimant's right knee "'gave way at work tonight.'"⁸ Claimant testified that speaking with the emergency room nurse she understood she had sprained her right knee.

⁷ *Id.*

⁸ May Depo., Resp. Ex. A.

Furthermore, claimant testified the nurse did not repeat a history to claimant that her knee had merely given way.⁹

The emergency room doctor's dictation indicates claimant had given a history of twisting her right knee. The doctor's notes reflect the following history:

51-year-old female relates that she twisted her knee tonight. She did fall to the ground, but she denies any other injury. She denies any neck pain or head injury, no chest pain, no loss of consciousness. She reports pain only to the right knee. She is able to ambulate but does have significant pain with this. She denies any prior injury, however, she does have a history of severe osteoarthritis to both knees and is scheduled to have them replaced in the near future.¹⁰

On October 25, 2006, claimant prepared a document entitled Injured Employee's Report of Injury. In that document claimant described her accident as follows:

Went to turn off drip in power soaker, right knee gave way and fell between power soaker & pot & pan machine. Hit knee on floor hit back at waist on pot & pan machine.¹¹

Claimant objected to the Employer's Report of Accident, which was marked as respondent's exhibit B to the regular hearing. It is not clear from the regular hearing transcript whether the Judge admitted that document. That document, which was not prepared by claimant, also contains a description of claimant's accident.

Claimant initially received conservative medical treatment for her right knee and in December 2007¹² received a total right knee replacement. Claimant was unable to return to work for respondent due to her medical restrictions. Since her termination claimant has sought both KPERS (Kansas Public Employees Retirement System) disability benefits and Social Security disability benefits. This is the only workers compensation proceeding claimant has initiated against respondent since she began working at the Osawatomie State Hospital in June 2001.

⁹ R.H. Trans. at 19.

¹⁰ *Id.*, Cl. Ex. 1.

¹¹ *Id.*, Resp. Ex. C.

¹² Pratt Report (Mar. 20, 2009) at 3.

1. Should the appeal be dismissed?

There is no dispute that respondent failed to specify in its notice of appeal the issues it desired to raise on this appeal. Likewise, there is no dispute that respondent failed to file its brief with the Board within its allotted time. Accordingly, claimant contends this appeal should be dismissed. The Board disagrees.

First, K.A.R. 51-18-3 provides that applications for Board review should specify the issues to be considered on an appeal but the regulation does not provide a penalty for failing to comply. Claimant has not cited, and the Board is unaware of, any statute in the Workers Compensation Act that requires the dismissal of an appeal when a party has failed to specify the issues being raised in its application for Board review.

Second, K.A.R. 51-18-4 specifies when the parties' briefs to the Board are due but the regulation does not provide a penalty for failing to comply. Again, claimant has not cited any statute, and the Board is unaware of, any statute in the Workers Compensation Act that grants the Board authority to dismiss an appeal when a party has failed to file a brief with the Board in a timely fashion.

In conclusion, the Board knows of no statute or regulation that empowers it to dismiss this appeal on the grounds now raised by claimant. Accordingly, claimant's request to dismiss this appeal is denied.

2. Should the October 13, 2006, Employer's Report of Accident be part of the record?

At the May 5, 2009, regular hearing respondent offered respondent's exhibit B, which is a Division of Workers Compensation form entitled Employer's Report of Accident. The report is dated October 13, 2006, and signed by Joyce Hammond-Perry as the EEO Director. Claimant objected to that document at the regular hearing and continued to object to the exhibit when the claim was submitted to the Judge for decision.

K.S.A. 44-557 requires employers to report accidents to the Division of Workers Compensation. Moreover, the statute prevents those accident reports from being considered as evidence in the claim. K.S.A. 44-557 provides, in part:

(a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service

for more than the remainder of the day, shift or turn on which such injuries were sustained.

(b) When such accident has been reported and subsequently such person has died, a supplemental report shall be filed with the director within 28 days after receipt of knowledge of such death, stating such fact and any other facts in connection with such death or as to the dependents of such deceased employee which the director may require. Such report or reports shall not be used nor considered as evidence before the director, any administrative law judge, the board or in any court in this state.

The Board finds the October 13, 2006, accident report falls under the provisions of K.S.A. 44-557(b). Therefore, the accident report may not be considered as part of the evidentiary record in this claim.

3. Did claimant's accident arise out of her employment?

The Judge found it was more probably true than not that claimant fell after slipping in water. The Board agrees.

Claimant's testimony is uncontradicted that the ceramic tile in the area where she fell would become very slick when wet. Likewise, no one contradicted claimant's testimony that her right side was wet when she got up after falling. Finally, claimant indicated it was not unusual for water to be on the floor in front of the power soaker that she was approaching at the time of her fall and, therefore, respondent kept rubber mats there to keep people from falling. Unfortunately, those mats were not in place when claimant fell.

In conclusion, the Board adopts the Judge's finding that claimant fell after slipping in water. The Judge had the opportunity to watch claimant testify and gauge her credibility as she explained why she initially reported her right knee had given way and that her right knee had never previously given way. In addition, the Board is not persuaded that the outcome of this claim is dictated by whether or not claimant's knee had given way as there is no evidence in this record to suggest that only a personal condition could have caused claimant's knee to give way.

4. What is the extent of claimant's impairment?

There is only one medical opinion in evidence regarding the extent of claimant's impairment. The parties filed a written stipulation admitting into evidence Dr. Terrence Pratt's March 20, 2009, medical report. In that report Dr. Pratt rated claimant's right lower extremity at 75 percent with 52 percent of that impairment existing before the October 9, 2006, accident. The doctor wrote, in part:

As a result of the assessment, she would have a point range of less than 50, which would result in 75% lower extremity permanency. I would consider 52% of the assessment to relate to factors prior to October 9, 2006.¹³

The Judge interpreted that language to find that claimant sustained a 36 percent (100% - 52% = 48%; 48% x 75% = 36%) functional impairment as a result of the October 9, 2006, accident. The Board agrees with that interpretation and affirms the Judge's finding. In short, claimant sustained a 36 percent impairment to her right lower extremity due to her October 9, 2006, accident. The July 21, 2009, Award is modified, however, to recompute claimant's award of disability benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 21, 2009, Award entered by Judge Howard.

Janet E. Hoover is granted compensation from the State of Kansas and its insurance fund for an October 9, 2006, accident and resulting disability. Based upon an average weekly wage of \$497.91, Ms. Hoover is entitled to receive 34.86 weeks¹⁵ of temporary total disability benefits at \$331.96 per week, or \$11,572.13, plus \$660.25 in temporary partial disability benefits previously paid, plus 58.73 weeks of permanent partial disability benefits at \$331.96 per week, or \$19,496.01, for a 36 percent permanent partial disability, making a total award of \$31,728.39, which is all due and owing less any amounts previously paid.

Claimant is entitled to payment of the authorized medical benefits.

¹³ Pratt Report (Mar. 20, 2009) at 5.

¹⁴ K.S.A. 2008 Supp. 44-555c(k).

¹⁵ By letter dated November 23, 2009, the Board requested clarification from the parties regarding claimant's temporary total disability. On November 25, 2009, the Board received an itemization provided by respondent showing the dates of and amounts paid in temporary total disability benefits. That itemization also contains the dates of and amounts paid in temporary partial disability benefits. It appears the entry for the disability payments for the period from July 27, 2008, through August 9, 2008, was inadvertently termed permanent total disability rather than temporary partial disability (see also p. 3 of the R.H. Trans.). The award has been computed using the 34.86 weeks of temporary total disability indicated in the itemization, the amount of temporary partial disability benefits previously paid (\$660.25) and converting the temporary partial disability to temporary total disability for purposes of computing the award.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Future medical benefits may be considered upon proper application to the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William W. Hutton, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Steven J. Howard, Administrative Law Judge